U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 June 2003

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In the Matter of
DAVID P. DANIEL Case No. 2002-AIR-00026
Complainant
v.
TIMCO Aviation Services, Inc.
Respondent
.....

Before: Stuart A. Levin
Administrative Law judge

For Complainant: David Daniel, Pro se

For Respondent TIMCO: Jonathan W. Yarbrough, Esq.;
Edwards, Ballard, Bishop, Sturm, Clark, and Keim, P.A.
Ashville, N.C.

Decision and Order

This matter arises pursuant to a complaint filed under the Wendal H. Ford Aviation Investment and Reform Act, 49 U.S.C. 42121(hereinafter, "AIR 21") by David P. Daniel, a Quality Control Inspector employed by Respondent, TIMCO. TIMCO provides contract maintenance services for large commercial aircraft. Daniel alleges that TIMCO fired him on May 14, 2002, because he had, *inter alia*, earlier reported to the Federal Aviation Administration that TIMCO serviced and installed an oxygen bottle in an aircraft without proper documentation. TIMCO, in turn, denies Daniel's charge of retaliation. It contends that it fired him for good and sufficient reason unrelated to any activity protected by AIR 21 when Daniel was allegedly caught sleeping in the tail section of a Boeing 767 he was assigned to inspect.

Following a period of discovery, a hearing convened on the merits of the complaint. Sixteen witnesses were called to testify and eighteen documents were offered into evidence, seventeen of which were admitted. The findings and conclusions which follow are based upon a careful consideration of the record evidence, the arguments presented by the parties, and the applicable case law.

Findings of Fact

1. TIMCO Aviation Services Inc. is the largest independent commercial jet maintenance, repair, modification, overhaul and aircraft storage service provider in the United States. The company currently operates five maintenance, repair, and overhaul businesses in several cities. Its corporate headquarters are located in Greensboro, N.C., and the circumstances which gave rise to this proceeding occurred at its Greensboro maintenance facility. Complainant, David Daniel was a Quality Control Inspector employed at that facility. Tr. 104.

2. At Greensboro, TIMCO operates a 600,000 square foot facility for the heavy maintenance and overhaul of commercial transport and cargo aircraft and their components, parts, and accessories. Tr. 262. It is an FAA, JAA and CAA certified Class IV (unlimited) facility containing three wide body hangars, and a Hangar IV complex for narrow body aircraft. Hangar IV also houses the TIMCO Engineering group and is the center of shipping, receiving and various administrative functions.

3. The FAA Flight Standards Office 5 is located at the airport in Greensboro. Dewayne Burns is an Assistant Principle Maintenance Inspector in that office. Tr. 274. The FAA has an anonymous hotline posted in TIMCO facilities. Tr. 268-69.

4. Roy Rimmer is TIMCO's CEO and the Chairman of its Board. Don Mitacek is Vice President and General Manager of TIMCO's Greensboro, N.C. facility. Robert McClellan is the Manager of Quality. Tr. 273. He supervises the inspection department, the production controllers, and TIMCO's chain-of-records controls. Tr. 274. Pete Morgan is TIMCO's Chief Inspector at the Greensboro facility. Tr. 217. James Childers is an Inspection Lead at TIMCO. David Latimer is the Vice President for Regulatory Compliance at TIMCO. He investigated Daniel's

charges of harassment. Tr. 26.

5. When an aircraft arrives at TIMCO, it undergoes an initial inspection, and "cards" are prepared designating "routine" and "non-routine" work the aircraft may require. Work associated with the customer's requests is shown on the "routine" cards. Tr. 184. The card provides fairly specific details on the work needed, and "how to inspect an area or to work a certain part." Tr. 112-113. The planning department then assigns an amount of time required to work the "routine" cards, and if the work is not completed in the amount of time allotted, it's called "running over." Tr. 113.

6. The record shows that "Non-routine" cards are generated when TIMCO inspectors detect problems during the course of the maintenance or service checks which were not noted on the "routine" cards. Tr. 185. Discrepancies noted during routine maintenance are reported as non-routine to indicate work that needs to be addressed. Tr. 28. When these are found, the inspector insures that maintenance "buy backs" from the non-routines are performed in accordance with the regulations. Tr. 185.

Daniel's FAA Contact

7. During a final walk-around on a United Airlines, Boeing 737, on or about August 15, 2001, it was noted that a crew oxygen bottle was pressurized to 1500psi rather than 1800 psi as required after heavy maintenance. As a result, the bottle was removed and serviced to 1800 psi. A final "routine" card was prepared for this service.

8. Upon inspection of the aircraft, Daniel correctly noted that the documentation showing "routine" service was incorrect and should be changed to a "non-routine" card. He prepared a "Work Reject Notice," CX 1; Tr. 22, and in late August or early September, 2001, he reported the matter to the FAA. Tr. 22; Tr. 238-40; CX. 1. He spoke with Inspector Burns and advised him that a violation may have occurred. Tr. 126.

9. In response to Daniel's information, Inspector Burns called McClellan and

advised him that he had received a call about an oxygen bottle on a United 737. Tr. 275. Burns did not identify the informant. Tr. 275. McClellan testified that he was unaware of the identity of the informant for several months before he heard "some hanger clatter" that Daniel was the informant. Tr. 276; Tr. 282. After receiving the call from Inspector Burns, McClellan contacted a supervisor in the hanger to let them know that Inspector Burns was heading their way. Tr. 283.

10. Inspector Burns subsequently visited TIMCO's facility and investigated the oxygen bottle documentation. Following his inquiry, he determined that the matter could be resolved without a letter of investigation. Tr. 276.

11. Daniel believes his work environment changed significantly after he contacted the FAA. During an eight month period immediately following his call, he claims he was targeted for harassment and retaliation eventually leading to his termination. The record does not reflect the exact chronology of each instance of alleged harassment, but it appears that his concerns, prior to the final termination, focus on six separate incidents which occurred in roughly the following sequence:

Formal Reprimand

The record shows that an inspector must o.k. the installation of any panel which covers a major aircraft component, and when an inspector signs off on a job, the inspector is responsible for the work. Tr. 118. On July 4, 2001, Daniel inspected and signed off on the installation of a ceiling panel which covered an air conditioning duct above the passenger compartment in a United Airlines aircraft. Tr.111. Three months later, United noted that the air conditioning had poor circulation in certain rows, and an investigation revealed that the air conditioning duct above the ceiling panel was loose. Tr. 118. United complained to TIMCO. Tr. 118.

As previously noted, TIMCO provides heavy check services, and typically it works in areas of an aircraft that will not be opened again until the next heavy check cycle unless discrepancies are noted by the customer. Tr. 262. As such, it is not unusual for a customer like United to contact TIMCO about a problem months after

TIMCO completed its work. Tr. 262-63.

When a customer complains to TIMCO, it investigates the problem as it did in response to United's experience. Its quality control procedures permit it to trace all parts and jobs back to the employee responsible for the work, and it routinely does backtrack to the responsible employee; in this instance, Daniel.

Although Daniel testified that Morgan told him he had discretion to reprimand or not and he elected to write it up, Tr. 120; 122. Tr. 227-230; Morgan testified that TIMCO conducts an investigation anytime it receives a customer complaint, and documentation of verbal counseling is routinely administered as the first level of disciplinary action whenever a customer complaint is traced to TIMCO responsibility. Tr. 231-32. Following United's complaint, TIMCO traced the inspection sign-off to Daniel, Tr. 119, and he was written-up. Tr. 120. RX. 9; Tr. 263.

FAA 8130-3 Tag

The record shows that Mike Parker was a TIMCO mechanic, Tr. 30, working under the direction of Daniel, Tr. 32, who was then serving as a temporary supervisor. Sometime in October of 2001, Tr. 106-107, as Parker and Daniel inspected an aircraft's right main landing gear door which had been re-skinned, they noticed that it lacked a serviceable or 8130-3 tag. Tr. 34. Parker reported the lack of the 8130-3 tag to the day shift supervisor and thought the matter was resolved. A day or two later, however, Parker and Daniel allegedly were told they were going to be disciplined for not accepting the door; and both were called to a meeting with Morgan. Tr. 35; CX. 2.

FAA form 8130 is an airworthiness release tag, Tr. 259, used, for example, to indicate the airworthiness of a component after maintenance or an overhaul. Tr. 259. The record shows, however, that there are alternatives to the 8130 tag, such as the non-routine card. Tr. 259. In the meeting with Daniel and Parker, a heated discussion apparently ensued during which Morgan explained that a serviceable tag was not needed if a non-routine was performed in-house under the service order of that aircraft. Tr. 37. While heated, the discussion was not unusual.

The record confirms that employees and supervisors at TIMCO often discuss, at times heatedly, the proper documentation and other issues during the course of aircraft maintenance. CX.2. Parker confirmed in his testimony that supervisors or inspectors occasionally disagreed about the way a repair should be handled, and it was not unusual for inspectors and others to disagree over type of documentation or certification that should be used in different circumstances. Tr. 116; Tr. 260. He further testified that, although he and Daniel were told they would be 'written-up" because of the landing gear door incident, he was never written-up or disciplined in any way, and his job was not threatened. Tr. 40-41. Tr. 47. Daniel was not written-up, but he believes, in contrast, that his work environment further deteriorated after the landing gear door incident. Tr. 106.

Leak of Draft Memorandum

Sometime in late fall or early winter of 2001, McClellan prepared a draft memorandum, and consistent with his customary practice, he provided it to the supervisor inspector in Hanger IV for his review and comment. McClellan explained that before he issues a memo he often consults with the supervisors in the effected departments. Tr. 279. In this instance, however, someone had gained access to his draft memo during the night, copied it, and circulated it to the staff. Tr. 109. By the time McClellan arrived at work the next day, he found copies of the draft "all over the facility," and he initiated an inquiry to determine how it got loose without his approval. Tr. 280.

Because Daniel was one of a very few individuals with a key to the third shift office, Tr. 108-109, he was questioned about the unauthorized release of McClellan's draft memo. McClellan testified that he asked everyone who had access to the office the same question. Tr. 280. While Daniel conceded it was not unreasonable to ask him about the memo because he had a key to the office, Tr. 115-116, he, nevertheless, felt accused of circulating it. The record shows, however, that McClellan never determined who leaked the draft, and no one was written up or disciplined over this incident.

"Running Over" on Routine Cards

As previously mentioned, routine cards are prepared when an aircraft arrives at TIMCO. These cards outline the work needed and, in conjunction with the planning department, estimate the hours required to complete each job. Tr. 107-108; Tr. 112-113. If the work is not completed in the time allotted, it's called "running over." Tr. 113. On the third shift, employees, in the past, had been told "not to run cards over... to stay billable." Tr. 113. More recently, however, TIMCO changed its policy.

The record shows that Daniel was assigned a card which had no time left, and, as a consequence, he charged his inspection time to an off aircraft parts inspection card. Tr. 112. As the economics of the airline industry tightened, however, firms like TIMCO were required to keep more accurate time records on maintenance which were used to develop competitive bid packages. Tr. 258. As a result, TIMCO made a push to ensure all employees were accurately charging their time, Tr. 259, and, in this instance, McClellan confronted Daniel and instructed him to charge his time to the correct card not an off aircraft parts card he was not actually working. Daniel acknowledged that he was not disciplined or written up about the incident, but he did sense that McClellan instructed him harshly to use the appropriate card. Tr. 114-115.

Lose of Temporary Supervisory Position

Jeremiah Gaddy is an inspector at TIMCO. Tr. 244. From time to time, he had designated Daniel as his temporary replacement supervisor in Hanger IV. Tr. 245-246. TIMCO employees who assume the position of a supervisor over a temporary period of time receive temporary supervisor's pay. The increase lasts as long as the employee has supervisory responsibilities. Tr. 260. It could last a day, a week or more. Tr. 261. Daniel was a temporary supervisor, never a permanent supervisor. Tr. 261. The record shows that Daniel, in the latter part of 2001 or early 2002, was reassigned from Hanger IV to work on a Boeing 767. Tr. 43. The reassignment resulted in Daniel's lose of temporary supervisor pay. Tr. 106.

Denial of Desirable Assignment

In anticipation of the arrival of an Airborne Express 767, Gaddy had indicated to Daniel that he wanted to assign Daniel to that aircraft line. CX. 2. When the plane arrived, however, Daniel was not assigned to it, and he asked Gaddy why. Daniel testified that Gaddy advised him that he could not be a lead on that aircraft because Pete Morgan did not want him in charge of anything. Tr. 116-117. Daniel called Gaddy to testify at the hearing, Tr.245, but he did not specifically ask Gaddy to testify directly about his conversation with Morgan concerning Daniel's assignment. Tr. 245-247.

Heather Neville, a Quality Control Inspector at TIMCO, was Daniel's supervisor on the third shift. Tr. 50-51. She testified that Gaddy told her Daniel would not be in charge of anything any more, but she never knew the reason. Tr. 52. Gaddy denied that he was aware that Daniel was having any problems with Morgan, Gaddy's supervisor, Tr. 246, and he denied knowledge of the circumstances leading to Daniel's discharge. Tr. 247.

Morgan denied he told Gaddy that Daniel would never be in charge of anything. He explained that the Airborne 767 was in for a heavy C check and pylon modification, and he wanted an inspector named Clayton Moore assigned as the inspector on the job, not Daniel who Gaddy had selected. Tr. 232-33.

12. The exact dates and the precise chronology of each of the foregoing events is not readily apparent on this record. Several were not precisely documented because the first time Daniel complained about any of these incidents was after his termination. Tr. 123; Tr. 21; Tr. 26-28.

Termination

13. Daniel was fired for allegedly falling asleep on May 10, 2002, while inspecting the horizontal stabilizer center box of a Boeing 767. The aircraft's elevators, or pitch controls, are attached to the horizontal stabilizers. Tr. 91.

14. James Childers is an Inspection Lead at TIMCO. CX. 5. He testified that on May 10, 2002, Daniel was assigned to work on the Boeing 767. Daniel pulled the cards he wanted to inspect and selected the tail section. Tr. 186-87. The rear of the aircraft was sticking out of the hanger so the auxiliary power unit could run, but the position of the tail section exposed it to the sun, and it was hot inside. Tr. 105; Tr. 201-202. Daniel inspected the vertical stabilizer internal section, Tr. 105, and, before he went back in to inspect the horizontal stabilizer box, he told Childers to check on him after awhile. Tr. 105-06.

15. Childers confirmed that Daniel mentioned to him that if he was not out of the horizontal stabilizer center box by three o'clock someone should check on him. Childers advised him to be sure to take the break scheduled for one o'clock, Tr. 192, but Childers did not see Daniel during the break. Tr. 192.

16. Inside the horizontal stabilizer box, there are three small access cavities. Tr. 203. RX 1; RX.2; RX. 3 (pictures of the Boeing 767 horizontal stabilizer box and first access hole.). Daniel was inspecting the wiring standoffs where the wires run through the clamps and examining the cables and cable pulleys. Tr. 127. He was inside the access hole up to his chest using a long mirror to check the items on the inspection card. Tr. 104-105. His body was partly through the first access hole and his arms were extended through the second access hole. Tr. 105; Tr. 123. He testified he was laying on his stomach, feet pointing toward the floor with one foot sticking out and the other against the stabilizer box to hold himself steady. Tr. 127-128; Tr. 131. He testified further that to inspect the horizontal stabilizer center box the inspector typically lies on his stomach and uses a mirror. Tr. 128. The inspection usually takes him an hour. Tr. 129.

17. About two o'clock, a mechanic, Doug Legg, reported to Childers that he thought someone was asleep in the "cavity." Tr. 193. Charley Roberts, a temporary team leader on May 10, 2002, reported that Doug Legg advised him that he could not finish a check on card 213 because an inspector in the horizontal stabilizer box did not appear to be moving. Legg advised him the inspector appeared to be in the same position for 20 to 30 minutes. Roberts looked up into plane and saw a foot. He advised Childers that the inspector was not moving and might be asleep, passed out, or dead. RX.10.

18. Childers climbed a ladder and poked his head and shoulders through the entrance hole at the bottom of the aircraft. He saw one leg hanging down and the other against a support brace. Tr. 193-94; Tr. 205-206. It appeared to him that Daniel was lying on his back and not moving. Tr. 199.

19. Childers hollered three times and there was no movement. Tr. 194; Tr. 196. He descended the ladder and reported to his supervisor, Bob Ingold. Tr. 194; Tr. 198. At the time he reported his concern to Ingold, Childers was not aware of Daniel's protected activities. Tr. 201.

20. Presley R. Ingold is a Quality Control Inspection Supervisor at TIMCO. Tr. 80. CX 4. RX 6. Sometime after the lunch break on May 10, 2002, Tr. 82. Tr. 91-92, he was advised by Mike Childers, Tr. 211, and others that Daniel, who was inspecting the tail of the Boeing 767, was lying motionless in the access hole. Tr. 90-91. Ingold and Childers moved a ladder, and Ingold climbed it into the entrance hole at the bottom of the aircraft's tail section, ascending up to his hips. Tr. 197. He observed Daniel for about 30 seconds and detected no movement. Tr. 82-83; Tr. 88. He noticed that Daniel was lying on his back, Tr. 211, legs crossed, feet pointed up, Tr. 93, and he thought Daniel was either sleeping, severely ill, or worse. Tr. 88. While Ingold noticed that Daniel's legs were crossed, Childers previously noticed that one leg was "dangling." Tr. 216.

21. Ingold called to Daniel three times with no response. Tr. 83. He saw Daniel's baseball cap lying in the bilge area, picked it up, and struck Daniel across the ankle. According to Ingold, Daniel then moved, and Ingold asked him if he was o.k. Tr. 83. Ingold testified that Daniel responded that he was alright, and Ingold told him; "Well wake up and get out of there and get some fresh air." Tr. 83. Childers heard Ingold yell to Daniel three times, Tr. 194, and finally call out; "How about waking up and signing off those cards." Tr. 194.

22. When Ingold climbed out of the plane, he told Childers to check on Daniel after a few minutes and he did. Childers testified he went up the ladder and yelled at Daniel who responded "I'm o.k., I'm o.k." Tr. 198. Roberts heard both Childers and Ingold call out to Daniel. RX. 10. A little while later, Childers sent

another inspector to tell Daniel to get out of the plane and get some fresh air. Tr. 198. Childers was certain Daniel had been sleeping. Tr. 199; RX 4, Tr. 200.

23. Directly contradicting Ingold, Daniel testified that while his hat was on stabilizer center box, Tr. 130, he did not feel Ingold swat him on the foot or ankle with it or hear him call. Tr. 129. He insists he never spoke to Ingold only Inspector Kuhlman or Woody. Tr. 129-130. He testified that the access hole space is so confined that the only thing he could move was his arms and head, Tr. 124, and he could not hear anything but other workers using a rivet gun. Tr. 105. The only person he claims he heard call was David Kuhlman asking if he was o.k. and he responded he was and was almost finished the inspection. Tr. 105.

24. Other witnesses also addressed the environment in the access hole. Parker testified that he was unable to inspect the center box of the Boeing 767 because he lacked sufficient flexibility. He was familiar with the two by two access hole to the left hand side of the jack screw, Tr. 95, but acknowledged that if someone called an inspector working in the access hole, he did not know if it could be heard. Tr. 95. Heather Neville, one of Daniel's supervisors on the third shift, also had not inspected the horizontal stabilizer center section of the Boeing 767, but she knew it was very tight. Tr. 98. She doubted she could not get into that section of the aircraft, Tr. 99, but testified that while outside sounds would be muffled inside the access hole, Tr. 101, she had not had an opportunity to experience the sound of someone near the access hole shouting for an inspector. Tr. 101-02.

25. Neville further testified that she never had a problem with Daniel's work, but noticed over time that "things got a little tougher" for him. Tr. 50-52.

26. Childers had inspected the horizontal stabilizer box of a Boeing 767. Tr. 191; Tr. 203. He testified that while performing the inspection "your body is constantly moving," Tr. 191, looking at the connections for the lines and wires, the fasteners, rivets, and stringers on the top. Tr. 204. The inspector, he claims, lies on his back inspecting the top of the box and the sides, using a flashlight and a mirror because when someone is in the access hole it blocks the light. Tr. 191; Tr. 204.

27. While Ingold has never inspected a horizontal stabilizer center box, he has been in one, and he thought it would not be difficult to hear someone calling. Tr. 84.

28. When Ingold observed Daniel, he could not see Daniel's eyes and did not hear him snoring, but Daniel was not moving and did not respond when Ingold shouted "about as loud as he could yell." Tr. 89. Based upon his observations, Ingold informed his supervisor, Pete Morgan, Tr. 212, that he had caught someone sleeping on the job. Tr. 218. RX 5. Tr. 219. At first, Ingold did not identify the inspector but during the course of the conversation he advised Morgan that it was Daniel. Tr. 235. Ingold was reluctant to reprimand Daniel because he thought a reprimand would involve peer review and Ingold was disillusioned by a previous experience with the peer review process. Tr. 212. Morgan instructed him, however, that if he thought Daniel was asleep, it was his duty to write him up, Tr. 213, and Ingold initiated the paperwork the next day. Tr. 213.

29. At the time he signed the reprimand, Ingold was unaware of Daniel's protected activities. Tr. 216. Morgan, while noting that he could not recall if he was ever informed that Daniel had contacted the FAA, Tr. 226, also testified that Daniel's FAA contact played no role in his decision to fire him. Tr. 242-43.

30. After receiving Ingold's report, Morgan then went to a hanger to look at a plane, see how the ladder was positioned when Childers and Ingold went up to call out to Daniel, and to get a mental image of Daniel's physical position in the horizontal stabilizer box. Based upon his inquiry, Morgan concluded that Daniel was sleeping. RX. 7.

31. The TIMCO manual specifies that sleeping on the job is a class three terminable offense. CX. 3; Tr. 88-89; Tr. 73; Tr. 125; Tr. 200; Tr. 225; Tr. 286.

32. Morgan alerted the Human Resources Department and took the proposed termination action, Rx 5, to his supervisor, Bob McClellan. Tr. 219-220. McClellan reviewed the proposed termination action and the attached statements and agreed with the action recommended. Tr. 277-78. He testified that he was

indifferent about the informant who contacted the FAA about the oxygen bottle documentation. Tr. 276.

33. Phil Hagler is a Supervisor in the Human Resources Department at TIMCO. Tr. 250. Morgan approached him on Monday, May 13, 2002, regarding Daniel's termination. Tr. 250. After hearing from Morgan, Hagler wanted to meet with Daniel. Tr. 220; Tr. 251. At Hagler's suggestion, Morgan, Hagler, and Daniel met in a conference in room in Hanger IV. Tr. 223; Tr. 236. Daniel explained orally what had occurred, denied he was sleeping, and prepared a statement . RX 8. After reviewing the circumstances, Hagler concluded that to perform the inspection in the tight quarters Daniel described, his feet would be moving even if slightly as he twisted and turned in the access hole. Tr. 252.

34. Since sleeping on the job was a group three major terminal offense, Hagler took the proposed reprimand to Don Mitacek for approval. Tr. 237-38; Tr. 253. Mitacek, TIMCO's General Manager in Greensboro, is involved in all reprimands which rise to a level of probation or above. Tr. 253. At the time, Hagler was not aware of Daniel's protected activity. Tr. 253.

35. Among her other duties, Susan Lovett, Manager of Human Resources and Payroll at TIMCO, reviews reprimands and terminations. Tr. 285. She explained that TIMCO's manual describes a process of progressive discipline. Repetitive infractions of a minor nature are handled progressively. Tr. 290. Group two infractions are more severe and written rather than verbal reprimands are issued. Group three violations are handled with written probation or termination. Tr. 290.

36. The record shows that since December, 1999, TIMCO has terminated four employees for sleeping on the job. Tr. 286. Each termination was imposed after the first incident for each employee. Tr. 287-88. All instances of sleeping on the job since December of 1999 were handled by termination. Tr. 291. None resulted in a less drastic personnel action. Tr. 291-92.

37. The record further shows that the manual provision addressing sleeping

on the job changed in 1999. Prior to the change, an employee caught sleeping on the job could request peer review. Tr. 293. In the summer prior to the change, however, it appears that a number of third-shift workers were caught sleeping on the job, prompting a change in the policy dealing with that offense. Tr. 292. Peer review was no longer available and termination was the prescribed action for the infraction. These changes were made long before Daniel's termination. Tr. 294. Daniel does not contend he was denied peer review for contacting the FAA. Tr. 126.

38. On May 13, 2002, Morgan met with Daniel in the presence of Ingold and Hagler to inform Daniel of his termination which Hagler and Mitacek approved the next day. Tr. 226. RX 5. Tr. 213.

39. Following his termination, Daniel contacted Latimer to discuss allegations of harassment during his tenure at TIMCO. Tr. 257. Latimer thus investigated Daniel's allegations post-termination. Tr. 27. He inquired into each instance of harassment alleged by Daniel and prepared a report. CX. 2; Tr. 258. Latimer testified that Daniel's communication to the FAA played no role in his termination. Tr. 265.

40. At the hearing, Daniel adduced the testimony of Mike Sizemore to demonstrate, *inter alia*, TIMCO's harsh treatment of its inspectors. Sizemore, an Aircraft A&P mechanic, once worked as an inspector under Daniel. Tr. 61. In one instance, Sizemore was involved in an incident involving a rob tag cannibalization form, used when a part is taken from one aircraft to fix another. Tr. 62. Management told him rob paperwork was not needed. Tr. 63. Thereafter, in a instance unrelated to the rob tag, he inspected a United Airlines plane. Seven or eight weeks after his inspection, a "panel left the aircraft," Tr. 65, and Sizemore was reprimanded.

41. It appears that United complained to TIMCO when a dorsal fin Sizemore had inspected fell off a Boeing 767 while it was landing at JFK Airport. Tr. 68. The dorsal fin is an exterior panel, approximately three feet by a foot and a

half, Tr. 78, which connects the upper fuselage to the vertical stabilizer. Tr. 77. The vertical stabilizer is commonly referred to as the tail of the aircraft. Tr. 77.

42. The inspection of the dorsal fin was traced to Sizemore. As previously found, *See*, Finding 11, *supra*, TIMCO inspectors are held responsible for complaints of this nature. Tr. 68-70. Accordingly, Sizemore was reprimanded, counseled, Tr. 68, and required to give a speech to co-workers. Tr. 65.

43. In another instance, Sizemore was called to work after a bachelor party. He advised management that he was intoxicated, but was instructed to report for work anyway. While the record does not show exactly what job Sizemore was called upon to perform on this occasion, it does show that the job he was given did not involve the use of any of his certifications or work on any aircraft. Tr. 66-67.

44. Sizemore, like Heather Neville, *See*, Finding 25, *supra*, testified that he never witnessed anyone harassing Daniel, although he did think that management "may have been a little rough" on him at times. Tr. 76.

Discussion

The statutory provisions set forth in AIR21establish a whistleblower protection program which prohibits air carriers, and contractors or subcontractors of an air carrier, from discriminating "against an employee with respect to compensation, terms, conditions, or privileges of employment" for engaging in protected activity. A protected activity occurs when the employee:

> "(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under [AIR21] or any other law of the United States;
> (2) has filed, caused to be filed, or is about to file (with

> any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under [AIR21] or any other law of the United States..." 49 U.S.C. §§ 42121; *see also*, 29 C.F.R. §§ 1979.102.

Daniel alleges that, as a consequence of his protected activity, TIMCO management treated him more harshly than other inspectors; removed him as a temporary supervisor; gave him undesirable assignments; issued him a reprimand; harassed and subjected him to a hostile work environment; and finally fired him. TIMCO does not dispute that Daniel engaged in protected activities, but it otherwise denies his charges of discrimination. Having carefully considered the evidence viewed in its entirety, and for the reasons set forth in detail below, I find and conclude that the complaint filed in this matter should be dismissed.

I.
Protected Activities

It is clear that TIMCO, a contractor engaged by major commercial air carriers, and Daniel, a former TIMCO inspector who provided safety-related information to the FAA, are both covered by the provisions of AIR 21; and the merits of Daniel's complaint have been fully litigated. Consequently, while Parshley v. America West Airlines 2002 AIR 10 (ALJ Aug. 5, 2002), may indicate the contrary, it would not, under applicable decisions of the Administrative Review Board, be particularly useful at this point to analyze whether Complainant has established a *prima facie* case. As the Supreme Court observed in United States Postal Serv. v. Aikens, 460 U.S. 709 (1983):

> Because this case was fully tried on the merits, it is surprising to find the parties and the [court] still addressing the question whether [the plaintiff] made out a *prima facie* case. . . .
> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence

> it needs to decide the [ultimate question of discrimination]. 460 U.S. at 713-14, 715.

The ARB and the Secretary of Labor have consistently invoked the Aiken principle in a variety of whistleblower adjudications. *See, e.g.*, Adornetto v. Perry Nuclear Power Plant, 1997-ERA-16 (ARB Mar. 31, 1999); Jones v. Consolidated Personnel Corp., ALJ Case No. 96-STA-1, ARB Case No. 97-009, Jan. 13, 1997; Etchason v. Carry Cos., Case No. 92-STA-12, Sec. Dec., Mar. 20, 1995, citing Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11, *aff'd*, Carroll *v.* U.S. Dept. of Labor, 78 F.3d 352 (8th Cir. 1996). Accordingly, it should suffice here simply to observe that TIMCO management was aware of Daniel's Work Reject Notice for the oxygen bottle documentation and had heard "hanger clatter" that he was the informant who spurred the FAA's onsite visit to look into the matter. TIMCO's protestations to the contrary notwithstanding, circumstantial evidence of management awareness is thus sufficiently compelling to support the conclusion that TIMCO knew who blew the whistle.

Daniel, moreover, was subjected to adverse personnel actions in temporal proximity to his protected activity sufficiently close to give rise to an inference of causation. Ertel v. Giroux Brothers Transportation, Inc., 88 STA 24 (Sec. Feb. 15, 1989), at 15; Stone & Webster Engineering, Inc. v. Herman, 115 F.3d 1568 (11th Cir. 1997); Mandreger v. Detroit Edison Co., 88 ERA 17 (Sec. March 30, 1994); Crosier v. Portland General Electric Co. 91 ERA 2 (Sec. 1994); Samodov v. General Physics Corp., 89 ERA 20 (Sec. 1993). Accordingly, "the critical inquiry is whether retaliatory animus motivated any of the adverse actions" challenged by Daniel. Frechin v. Yellow Freight, 96 STA 34 (ARB Jan.13, 1998); *See also*, Mitchell v. Link Trucking, Inc., 2001 STA 39 (ALJ, May 9, 2001).

Before turning to the instances which constitute the pattern of harassment alleged by Daniel, there are two aspect to this case which merit some discussion. The first addresses an interpretation of the term "tangible consequences" in light of Complainant's allegation that he was subjected to retaliatory written reprimands; the second focuses on his contention that the Employer treated its safety inspectors too harshly.

A.
The "Tangible Consequences" Exception

1.
Title VII vs. Whistleblower Protection

There is a growing tangent in the administrative case law which suggests that certain types of discriminatory treatment of protected employees are not actionable under AIR 21 or other whistleblower statutes administered by the U.S. Department of Labor. Recently, for example, in Robichaux v. American Airlines, 2002 AIR 27 (ALJ, May 2, 2003), it was observed that, absent a showing of "tangible consequences" such as a demotion, neither discriminatory oral criticism nor negative written evaluations can be considered actionable adverse actions. Robichaux's reasoning was predicated upon decisions of the Administrative Review Board in Shelton v. Oak Ridge National Laboratories, 1995-CAA-19 (ARB March 30, 2001)(an oral reminder only), and Ilgenfritz, Jr. v. U.S. Coast Guard Academy, 1999-WPC-3 (ARB August 28, 2001). *See also*, Jenkins v. EPA, 1988-SWD- 2, (ARB Feb. 28, 2003). Ilgenfritz, in turn, relied upon Davis v.Town of Lake Park , 245 F.3d 1232, 1242 (11th Cir. 2001) in which the Eleventh Circuit observed in a Title VII race discrimination case that: "Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. Expanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance." To the extent Davis is spawning administrative progeny in the whistleblower arena, a brief pause to reflect upon the court's decision, and Title VII in general, would not seem imprudent.

2.
Davis and Title VII

Initially, in discussing the adverse performance evaluations challenged in Davis, the appellate tribunal had before it the undisturbed findings of the trial court: "that Davis had failed to prove that he was treated differently than any similarly-situated white employees, and thus failed on that ground as well to establish a prima facie case under Title VII." In this respect, Title VII and

whistleblower protections are alike. When the adverse action is non-discriminatory, neither a Title VII worker nor a whistleblower can prevail.

The Davis court proceeded, however, to consider the two adverse "evaluations" Davis received and noted that one was merely a counseling memorandum, and the other, apparently a bit more critical, was only temporary and had been removed from Davis's personnel file. Presumably, a valid distinction, which I will discuss in some detail below, can be made between oral or non-permanent reprimands and written, permanent adverse personnel actions. Still, as Robichaux and Illgenfritz indicate, the court's decision in Davis embraces the notion that discriminatory performance appraisals and reprimands, whether temporary or permanent, do not give rise to the type of "tangible consequences" sufficient to sustain a Title VII action.

To be sure, Title VII cases, in general, have traditionally provided guidance in adjudicating the elements of discrimination in whistleblower cases.[1] Yet, there are distinctions between these two category of cases which suggest that the type of "tangible consequences" plaintiffs must demonstrate in Title VII cases may, in some instances, be different from the "tangible consequences" in a whistleblower case. When it comes to assessing "tangible consequences," the question is whether the analytical underpinnings of Title VII are equally cogent in a whistleblower context.

3.
Title VII Objectives

Title VII, in its workplace context, is designed to prevent employers from, *inter alia*, engaging in race discrimination against individuals in their workforce. Like the whistleblower statutes, it defines and targets the improper activities of the employer, and seeks to protect covered individuals from the adverse consequences of unlawful behavior. Unlike the whistleblower statutes, however, a worker covered by Title VII need take no action, alter any behavior, or engage in any

[1] *See e.g.*, Dartey v. Zack Company of Chicago, 82-ERA-2, (April 25, 1983); Sherrod v. AAA Tire and Wheel, 85-CAA-3, (November 23, 1987);DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984), applying Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and Mt. Healthy City School District Board of Education v.Doyle, 429 U.S. 274 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

activity to secure the protections afforded by the Act. Title VII protection is provided to a class of workers by virtue of passive characteristics relating to who they are, not what they do; and it ensures that the protected class is afforded equal opportunity to enjoy the same terms, conditions, and privileges of employment extended to other members of the employer's workforce.

Since an employer's race based discrimination is not designed to change the worker's behavior, Title VII protection is intended to alter the misbehavior of one side of the employment relationship while guaranteeing equal economic opportunity to the other. Indeed, unlike the whistleblower situation, the worker's behavior is not what motivates the discrimination, and it is in this context, in assessing adverse action against a Title VII covered worker, the courts have defined "tangible consequences" as those which affect job opportunities such as assignments, pay, and promotion. Title VII cases, therefore, address the employer's misdeeds and redress the "tangible" lost economic opportunities that the misconduct actually generated.

4.
Whistleblower Protection Objectives

The whistleblower enactments serve a somewhat different objective. To be sure, they seek to prevent discrimination against a defined group of protected workers, but, unlike Title VII, whistleblower statutes also affirmatively seek to encourage workers to participate in public processes. Thus, employees are invited to take positive action deemed to be in the public interest and in return receive the promise of statutory coverage. Unlike the Title VII worker, whistleblowers are volunteers and free either to join the protected class by participating in an activity Congress deemed in the public interest or remain silent; and if they opt for the former, Congress intended to protect them.

5.
The Purpose of Whistleblower Protection
v.
The Purpose of Retaliatory Reprimands
and
Ratings of Record

Thus, the importance of providing coverage against retaliatory personnel actions in a whistleblower context is, as shall be demonstrated, neither impractical

nor a whimsical tilt toward the theoretical. Most personnel managers appreciate, and the U.S. Department of Labor, itself, understands,[2] that negative ratings and reprimands of record, without more, can be quite persuasive in changing behavior. Indeed, such personnel actions are designed to prompt behavioral modifications, and, for better or worse, they are a potent threat to the job or career of the worker who fails to heed them. Nor are discriminatory responses of this type imbedded in a worker's personnel file the simple equivalent of a Shelton-type "oral reminder." In a bit more sinister way, retaliatory personnel actions of a permanent nature not only penalize past whistleblowing; by design, they more forcefully seek to alter future behavior by serving notice on the targeted employee that, despite what Congress may have promised, whistleblowing will not go unpunished; if not immediately, then eventually.

And beyond that, if it is permissible, as some cases suggest, to subvert a worker's personnel record with discriminatory reprisals, an employer intent upon suppressing whistleblowing would have little reason to hide the fact that it is authorized to retaliate in this way if it so chooses; and workers would be foolish to ignore the risk. Given the porous nature of the workplace environment, once the word gets around, as it surely would, that tarnishing permanent personnel records is an acceptable response to allegedly protected activity, the disincentives to an employee thinking about blowing the whistle would seem considerable. In a very practical sense, then, to conclude, in the context of a whistleblower proceeding, that a personnel tool inherently intended to alter employee behavior can be used without regulatory consequence in a retaliatory manner against the precise behavior Congress had hoped to encourage, is to place a "tangible" weapon in the hands of those who consider protected activity an unwelcome intrusion in the workplace.

Still, some might suggest that there is no cause for concern because time enough exists to protect the whistleblower once he or she is actually demoted, re-assigned, or fired. Yet, time is not the ally of a whistleblower. As the temporal nexus between the protected activity and the adverse action widens, the risks to the whistleblower increase; and his case, unlike the Title VII worker's, becomes more

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[2] Thus, the Department distinguishes between oral admonishments and written performance appraisals in its own published personnel practices, and it recognizes that admonitions "reduced to writing" and "ratings of record" are sufficiently "tangible" adverse personnel actions to constitute a grievable personnel action. *See*, DOL Personnel Regulations, Chapter 430, Appendix C, Para. 9; see also, labor agreement with Local 12 of the AFGE, AFL/CIO, Article 45, Section 4.

difficult to prove.[3] Consequently, if employees can not cleanse their records of retaliatory adverse material before the axe is allowed to fall, few workers will fail to appreciate that, in time, their personnel records may be unsalvageable. Common sense would then suggest that fewer still would likely see any advantage in volunteering as a whistleblower. Under these circumstances, interpreting as inconsequential the misuse of a personnel instrument designed to alter employee behavior risks protecting, and, even worse, validating, not the flow of information the statute was intended to shield, but precisely the type of unwanted response which Congress had hoped to suppress.

6.
Adverse Performance Appraisals and Reprimand's As "Tangible Consequences" in Whistleblower Proceedings

While Title VII case law, as discussed above, generally guides some whistleblower decision-making on this issue, there is contrary authority which suggests that "tangible consequences" may exist without direct economic impact. Thus, the ARB in Gutierrez v. University of California, 1998 ERA 19 (ARB Nov. 13, 2002), held that a negative comment in a performance evaluation demonstrably attributable to protected activity was "an unfavorable personnel action within the ERA."[4] *See also*, Stoller v. Marsh, 682 F.2d 971 (D.C. Cir. 1982) (reliance on discriminatory performance evaluation placed in employee's personnel folder before fair opportunity for review violated Title VII). This is not, of course, to suggest that every negative oral criticism, or written, but temporary, reprimand triggers an AIR 21 or other whistleblower cause of action; and certainly non-discriminatory, non-retaliatory personnel actions never do. It does seem clear, however, that if discriminatory patterns of harassment or retaliatory, adverse permanent performance

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[3] Unlike the Title VII worker whose protected status does not change, the whistleblower's case gets tougher to prove over time as the inference of a causal link attenuates. *See generally*, LaTorre v. Coriell Institute For Medical Research, 97 ERA 46 (ALJ, Dec. 3, 1997), *aff'd. and remanded on other grounds*, 98 ARB 40 (February 26, 1999); Mandreger v. The Detroit Edison Co., 88 ERA 17 (Sec., March 30, 1994) (Six month interval between whistleblower activity and adverse job transfer); White v. The Osage Tribal Council, 95 SDW 1 (ARB Aug. 8, 1997) (Proximity in time ... is solid evidence of causation). Thus, a vindictive but patient employer gains time advantages in a whistleblower case. By piling up a few adverse evaluations seemly far removed from the protected activity, the hypothetical "tangible consequence," such as a demotion can be made to seem far less pretextual. In contrast, a temporal nexus always exists for a Title VII worker.

[4] The ARB in Gutierrez also found that a relatively small pay raise was a retaliatory action under the ERA.

evaluations causally related to whistleblowing are permitted to slip under the radar screen, only the very daring or those employees with hefty masochistic tendencies are likely to come forward; and the policies which underlie the Act may be seriously compromised.

Thus, considering the objectives of the whistleblower enactments, it seems appropriate to suggest that a "tangible consequence" in these types of cases is not merely one which impacts the worker's narrow pecuniary interests, but one which is likely to stifle precisely the sort of behavior Congress intended to encourage, i.e. a "tangible consequence" in a whistleblower context is one which is reasonably likely to dissuade potential whistleblowers from getting involved in allegedly protected activity; a "consequence" which not only impacts the worker's economic interests immediately as in a Title VII setting, but one designed to counteract a worker's incentive to engage in activities Congress sought to encourage.

It does not stray beyond the proper realm of administrative adjudication to postulate, *a priori*, that if reprisals, especially of a permanent nature or constituting a pattern of harassment, are allowed against an activity valued in the public interest, society is likely to get less of the valued activity. Conversely, one protects the behavior one wishes to promote; and this seems to be what Congress intended in dealing with the type of activity covered by the whistleblower statutes. Thus, in fostering the substantial public interest reflected in such enactments as the Air 21(Airline Industry); Energy Reorganization Act of 1974, as amended, Section 211, 42 U.S.C. §5851(Nuclear Industry), Clean Air Act, 42 U.S.C. §7622; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610; the Solid Waste Disposal Act, 42 U.S.C. §6971; the Safe Drinking Water Act, 42 U.S.C. 300j-9; the Federal Water Pollution Control Act, 33 U.S.C. §1367; Surface Transportation Assistance Act, 49 U.S.C. §31105 (Trucking Industry); the Toxic Substances Control Act, 15 U.S.C. §2622, and Sarbanes-Oxley Act of 2002, 18 U.S.C §1514A (Accounting Industry), the legislature sought to encourage workers voluntarily to communicate their environmental, safety, and certain other concerns while condemning discriminatory actions which target the activities Congress deemed beneficial in the public interest.[5] Whistleblowing is protected; retaliation is discouraged, not the reverse.

[5] In protecting federal whistleblowers, for example, a reprisal is deemed adverse and actionable. *See,* 5 U.S. C. § 2302(b).

Accordingly, it would seem that proof establishing an employer's retaliatory issuance of an adverse "rating of record" or permanent written reprimand, thereby indelibly scaring a worker's personnel record in reprisal for engaging in protected activity should be sufficient to invoke the prophylactic remedies envisioned by these enactments. Under these circumstances, and in the absence of direct precedent to the contrary under AIR 21, Complainant's allegations that he was the target of either a discriminatory reprimand of record or a pattern of harassment before he was fired should be considered on the merits. [6]

B.

Harsh Accountability Standards

Consistent with the foregoing discussion, I have considered Daniel's allegations that TIMCO reprimanded him unfairly in writing when it held him accountable several months after he approved the installation of a panel covering an area of a United Airlines aircraft which later developed an air conditioning duct problem. Daniel adduced further testimony from a co-worker, Mike Sizemore, that he too was subjected to a written reprimand several months after a Boeing 767 he inspected lost a dorsal fin while landing at JFK airport. These instances of discipline imposed upon inspectors several months after their inspection sign-offs, Complainant argued, demonstrate TIMCO's harsh, hostile attitude toward its inspectors. In the context of an AIR 21 whistleblower complaint, in the circumstances demonstrated in the record and considered on the merits, this argument is misplaced.

As recently observed in Szpyrka v. American Eagle Airlines, Inc., 2002-AIR-9 (Order Denying Sum. Dec., ALJ, July 8, 2002), AIR 21 "protects not just the employee whose personal interests are at stake; AIR 21 triggers a Congressional mandate to foster the public interest in whistleblower activities involving

[6] It is, of course, possible that a protected employee was, for example, the target of discriminatory personnel actions at some point, but eventually was terminated for good and proper cause or received fair, non-discriminatory ratings but was ultimately terminated in retaliation for protected activity. Under circumstances in which a case has been fully litigated, however, the issue, as the Supreme Court has held, is whether discrimination motivated the adverse action, and when : "The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination]," it should do so. Aiken, at 460 U.S. at 715.

commercial aviation safety issues." The policies embodied in the Act thus reflect the traveling public's interest in aviation safety by improving the environment which fosters greater participation in safety-related issues by aviation industry employees. The Act accomplishes its goals, however, not by compromising existing quality control measures, but by complementing the aviation safety-related procedures and standards already in place.

Air 21 thus renders whistleblowers no less accountable than others for their infractions or oversights. It ensures only that they are held to no greater accountability and disciplined evenhandedly. Consequently, no personnel policies or standards need be watered-down in the interest of shielding otherwise protected activity or accommodating the policies promoted by the Act. Aircraft system failures or loose, rattling connections in an aircraft, if not outright safety hazards, are not reassuring to the traveling public nor is watching a part fly off an aircraft approaching for an otherwise normal landing. Nothing in AIR 21 limits the processes or employee accountability procedures designed to minimize such incidents.

Thus, TIMCO responds to airline complaints about problems of this type by tracing its records back to the inspectors who worked on the area of the plane affected by the problem and holding the inspector accountable. There is nothing in this procedure which is inconsistent with the Act. To the contrary, Air 21 allows each employer covered by its reach to ensure the quality and integrity of the parts and services related to aircraft maintenance it provides or the flight operations it maintains. It may thus seem harsh to Daniel to hold accountable inspectors or others who sign-off on areas of an aircraft which later develop a problem, but TIMCO deems such accountability an important aspect its quality assurance program, and its policy is unassailable under AIR 21.

In contrast, what is relevant for purposes of this proceeding, and is reviewable here, is not TIMCO's policy itself, but the implementation of the policy. A quality control mechanism which is plainly consistent with AIR 21 may be applied in a manner the Act forbids. TIMCO, however, survives such scrutiny.

Evidence adduced by Daniel at the hearing reveals a strict but evenhanded approach to this situation. Thus, Daniel, after engaging in protected activity, was written-up or reprimanded for an incident which occurred several months after an inspection; and his co-worker, Sizemore, in similar fashion, was written-up for an occurring several months after his inspection. Daniel's reprimand consisted of counseling to remind him "of the need to give a good look at aircraft systems/components... when giving o.k. to close," and seems consistent with, though not quite as stern as, the reprimand meted out to Sizemore considering the nature of the incidents. Consequently, while a written reprimand or adverse appraisal filed in retaliation may be actionable, Complainant, himself, demonstrated TIMCO's non-discriminatory application of a policy designed to hold employees accountable for their inspections, and, as such, demonstrated the propriety of the written reprimand he received. AIR 21 contemplates no remedy under such circumstances.[7]

II.

Harassment

Daniel also complains of three instances of alleged harassment and hostility related to discussions he had with supervisors about the proper documentation for a re-skinned landing gear door, the incorrect reporting of time on an off aircraft parts card, and a leaked memorandum. None of these incidents resulted in any written personnel action or formal discipline of any type, but Daniel sensed that in each instance his supervisor addressed him harshly because he had previously contacted the FAA. I have carefully considered these incidents and find no pattern of harassment evident.

The record shows, and Daniel's witness, Parker, confirmed that discussions and meetings about the proper documentation for various aspects of an aircraft

[7] In Gutierrez, *supra*, the inclusion of a customer compliant in a performance evaluation gave rise to cause of action due to its discriminatory nature. Here no discrimination was established. Thus, unlike Title VII cases, Gutierrez indicates that it is not the immediate economic "tangibility" or "intangibility" of the written evaluation or reprimand which matters, but the discriminatory or non-discriminatory, retaliatory or non-retaliatory nature of the action which, under the whistleblower statutes, is controlling.

maintenance job are not unusual and are often vigorous. It appears that just such a disagreement arose when Parker and Daniel thought an 8130-3 tag was required to document a re-skinned landing gear door while Morgan and others thought it was properly documented with a non-routine card for work performed in-house. The discussion which ensued was described a "heated," but nothing in the record suggests that it was related, in tone or substance, in any way to Daniel's prior protected activity.

A similar "confrontation" occurred when McClellan and Daniel discussed how Daniel should report his hours. Daniel reported time on an off aircraft parts card to avoid running over on a routine card and to stay "billable." Apparently, there was a time when the type of reporting Daniel used here was accepted practice at TIMCO. The competitive environment in the industry, however, required some adjustments and spurred TIMCO to require all employees to provide "more accurate" time reporting for its competitive bid packages. As a consequence, McClellan directed Daniel to report his time to the correct card rather than a card he was not actually working, and Daniel believes McClellan addressed him "harshly."

Yet, the record shows that McClellan neither wrote-up Daniel or disciplined him in any way for incorrectly reporting his time. Nor does it show that he singled-out Daniel for unwelcome attention targeted at a protected worker and not others. McClellan was responding to TIMCO's more enlightened time reporting policies when he instructed Daniel to show his time accurately, and there is no evidence in this record which suggests that his tone or manner in doing so was related to Daniel's protected activity.

In still another incident involving McClellan, Daniel felt unfairly accused and singled out when McClellan questioned him about the "leak" of a draft memorandum. Apparently the draft was under lock and key in the third shift office, and Daniel was one of two or three employees who had the key. McClellan, justifiably peeved about the leak, questioned everyone who had access to the office. Unable to determine who engaged in this mischief, McClellan actually accused no one. To be sure, Daniel was one of very few interviewed, but McClellan's actions were reasonable, evenhanded, and entirely appropriate under these circumstances.

III.

Loss of Temporary Supervisor Position and Undesirable Assignment

Several months after he reported the oxygen bottle incident to the FAA, Daniel was assigned to a line he had not requested and lost his position as a temporary supervisor. Even under Ilgenfritz, Jenkins, and Robichaux, a retaliatory loss of position or pay would be deemed "tangible." Thus, the record shows that Gaddy had from time to time designated Daniel as a temporary supervisor and was inclined to assign Daniel to an incoming Airborne 767 when he was overruled by Morgan. Daniel claims that Gaddy told him that Morgan had said he never again would be in charge of anything, and Neville reported hearing Gaddy express a similar comment. Gaddy testified at the hearing, but he was never asked about any conversation he had with Morgan; and Morgan denied that he told Gaddy that Daniel's day's as a temporary supervisor were over.

Now the only direct testimony in this record about Morgan's comment comes directly from Morgan, and he denied he said what Neville and Daniel say Gaddy said he said about Daniel. While hearsay rules are not strictly enforced in administrative proceedings, the reliability of double hearsay is always suspect. Beyond that, the record shows that Daniel was permitted to, and in fact did, serve as a temporary supervisor after his contact with the FAA. He was serving in that capacity when the issue arose regarding the 8130 tag, and he was questioned about the leaked memorandum precisely because, as a supervisor, he had a key to the third shift office. Protected activity triggered no change in that status.

Nor has Daniel succeeded in demonstrating that Morgan's decision to override Gaddy and assign Clayton Moore to the incoming Airbourne 767 was anything more than a management resource allocation decision unrelated to Daniel's protected behavior. Morgan explained that the Airbourne plane was in for a heavy C check and pylon modification, and he wanted Moore as the inspector on that job. The record shows that such assignments and reassignments are routine at TIMCO, and, from all that appears in the record, was not unusual in this instance. Morgan's choice, it seems, was based upon his preference for Moore on this particular job rather than an aversion to Daniel.

IV.

Sleeping on the Job

Finally, Daniel challenges TIMCO's decision to terminate his employment. TIMCO asserts that it fired Daniel for sleeping on the job, or, at least, its good faith, reasonable belief that he was asleep on the job. Daniel contends otherwise. He denies he was sleeping and alleges that TIMCO was motivated to rid itself of his services because he engaged in protected activity. In addition to Daniel's testimony, the evidence addressing these crucial issues is largely circumstantial.

The record shows that Daniel was wedged into the access hole to the horizontal stabilizer center box when this incident occurred. No one could see whether his eyes were open or closed and no one heard him snoring. Several employees did, however, observe that he was not moving and expressed concern about his condition. Two, Ingold and Childers, observed him lying on his back and called out to him at close range without response; Ingold finally received a response allegedly after swatting him on the foot or ankle with a hat. Ingold among others concluded that Daniel had been asleep.

Daniel believes TIMCO's interpretation of events is distorted by its desire to retaliate against him. He contended he was lying on his stomach inspecting the horizontal stabilizer center box, wedged so tightly into the access hole that he could not hear noises from the outside. He adduced testimony from Inspector Heather Neville which tended to confirm that outside sounds would be muffled in the access cavity, but others observed that someone shouting could be heard. He denied that he heard Ingold or Childers hollering to him or that he spoke with either, and further denied that he felt Ingold swat him with the hat. Ingold and Childers, in contrast, both testified that they eventually received a response from Daniel, although Daniel claims he heard no one but Inspector Kuhlman call out to him, and only then did he respond.

Now, it is impossible to determine definitively whether Daniel was asleep inside the access hole, but circumstantial evidence persuades me he was probably

snoozing when he should have been working. I am mindful of his suggestion that if he wanted to sleep he could have found a place more comfortable than the heated section of an aircraft tail exposed to the sun, and that is no doubt true. Yet, Daniel picked the exposed tail section and pulled the cards for the areas he wanted to inspect. He was not given this uncomfortable assignment by a vindictive supervisor. Moreover, once inside the access hole the inspection was performed lying down with only the inspector's legs visible to a supervisor on the outside. Consequently, an inspection in the access hole, while not the most comfortable place, provided a natural reason to recline without requiring an explanation should the need for a brief catnap overtake a drowsy inspector.

Even more persuasive in the record is evidence that experienced co-workers who otherwise had no knowledge of Daniel's protected activity and no motivation to trump-up charges against him, concluded from observing his legs extending from the access hole that something was amiss. Indeed, the first indication of any problem was communicated by a mechanic, Doug Legg, who reported that he thought someone was asleep in the cavity. Legg communicated his concerns to temporary team leader, Charley Roberts who, in turn, reported to Childers that whoever was in the access hole was not moving and was either asleep, passed out, or dead. This evidence is significant as a clear indication that these experienced workers, observing Daniel's legs extending from the access hole motionless for an extended period, sensed that they were not observing a normal situation. These workers concluded that Daniel was motionless too long for a normal inspection and too long to overlook the possibility that he was in trouble or worse. They reported what they observed because what they observed was unusual. Neither Legg nor Roberts had any reason apparent on this record to mis-report their observations or impressions.

Moreover, after speaking with Roberts, Childers climbed a ladder and poked his head and shoulders through the entrance hole at the bottom of the aircraft. He could not reach Daniel's legs a few feet away, but he saw one leg hanging down and the other against a support brace. It appeared to him that Daniel was lying on his back, and he was not moving. Seeking Daniel's attention, Childers hollered to him several times without response. Childers then climbed down and summoned his supervisor, Bob Ingold. At the time, Childers was unaware of Daniel's protected activity, and there is no indication in the record suggesting that Childers had any

motivation to misrepresent his observations or his impressions when he expressed concern to Ingold that Daniel was lying motionless in the access hole.

Apprised of the situation, Ingold, like Childers before him, climbed the ladder into the entrance hole at the bottom of the plane ascending up to his hips. He noticed that Daniel's legs, now crossed, were not moving. He shouted loudly several times to attract Daniel's attention without success, and then noticed Daniel's hat laying nearby. Using the hat, Ingold reached up and swatted Daniel's foot or ankle. Ingold testified that at that point Daniel responded, and he directed Daniel to wake up and get some fresh air. Ingold then climbed down and instructed Childers to check on Daniel in a few minutes. Daniel, as noted, disputed this account, testifing that he neither felt anything touch his foot nor did he respond to Ingold or Childers. Daniel's account is not credible.

By the time Ingold climbed the ladder to check on Daniel, he had received reports from three sources that an inspector was asleep, in distress, or possibly dead in the horizontal stabilizer center box access hole. No one actually knew Daniel's fate, but Roberts confirmed that he heard Ingold call out to him. Consequently, had Daniel not responded when Ingold swatted him, and I believe he did, Ingold likely would have reacted with a bit more urgency than simply climbing down the ladder and directing Childers to check on Daniel in a few minutes. He was, after all, dealing with the possibility that Daniel was not merely asleep but in severe distress; and if a swat on the foot failed to roust him, the more serious alternatives became more likely. If, as Daniel contends, he failed to respond to Ingold under those circumstances, I believe Ingold would have responded with sufficient concern to seek help in removing Daniel from the access hole. To do otherwise would have been irresponsible, and having observed Ingold testify at the hearing, irresponsibility is not an attribute I would ascribe to him.

Equally significant, Childers, at Ingold's direction, climbed the ladder several minutes later to check on Daniel. He too testified that he spoke with Daniel, but Daniel denies responding to Childers. According to Childers, Daniel told him he was "o.k." Again, I find Daniel's account lacking credibility. The record shows that Childers, after checking on Daniel at Ingold's direction, climbed down and told another inspector to check on Daniel in a few minutes. Like Ingold, I find it

unlikely that Childers, after receiving instructions to check on Daniel, would have simply left Daniel in the access hole if he was still unresponsive and Childers was not satisfied that he was conscious. Under these circumstances, I believe Childers, too, would have summoned help had Daniel remained uncommunicative.

I am mindful of the evidence which suggests that outside sounds would be muffled in the access hole; however, once awakened, the sounds were not so muffled that Daniel was unable to hear and eventually respond to Ingold, Childers, and, by his own admission, Kuhlman. Nor do I find persuasive Daniel's contentions that he was lying on his stomach not his back as Ingold and Childers contend and that his legs were not actually motionless as several witnesses testified.

The record shows that Daniel had one leg "dangling" when Childers first observed him and his legs were crossed when Ingold looked through the entry a few minutes later, thus indicating movement at some point between the two observations. Yet, such movement does not impeach the witnesses who testified that Daniel was motionless when they observed him, and it does not undermine TIMCO's basis for believing he was asleep. A cat may flick its tail while lolling in the sun. A person catching 40 winks may, from time to time, unconsciously adjust to a more comfortable position. And, so too, Daniel, according to his co-workers, was in all likelihood snoozing on the job when he apparently shifted his dangling leg. For all of the foregoing reasons, I find and conclude that Daniel appeared to be, and probably was, dozing in the access hole. TIMCO, indeed, had reasonable basis for believing, in good faith, that he was asleep.

V.

The Termination

The record shows that sleeping on the job is cause for termination at TIMCO, and, more importantly, it shows that every worker since 1999 caught sleeping was subjected to the same penalty. Apparently, sleeping on the job was a major problem at the Greensboro facility, and TIMCO responded by changing its policy relating to that offense; first by making it a cause for termination, and second, by removing it from the peer review procedures. As a result, four employees were caught sleeping on the job since 1999, and none received a personnel action less drastic than

termination. Consequently, while I believe Morgan and McClellan were aware of Daniel's protected activity and participated in the decision to fire him, the decision itself was entirely consistent with TIMCO policy which the record demonstrates was applied on a uniform, consistent, non-discriminatory basis. In this instance, Daniel, despite his protected activity, was treated exactly like other TIMCO employees charged with the same infraction.

VI.
Hostile Work Environment

Daniel also alleged that he was subjected to a hostile working environment in retaliation for his protected behavior. A complaint alleging a hostile work environment differs from specific claims in that the former requires proof of "severe or pervasive conduct." The Board has observed that the requirements of a hostile work environment claim are that: 1) the complainant engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *See*, Pickett v. Tennessee Valley Auth., 2000 CAA 9 (ARB Apr. 23, 2003; Williams *v.* Mason & Hanger Corp., ARB No. 98-030, ALJ Nos. 97-ERA-14 et al., slip op. at 13 (ARB Nov. 13, 2002); Berkman *v.* U.S. Coast Guard Acad., ARB No. 98-056, ALJ Nos. 97-CAA-2/9, slip op. at 16-17, 21-22 (ARB Feb. 29, 2000).

Having considered the record evidence viewed in its entirety, I find that Daniel has failed to substantiate the elements prerequisite to a hostile work environment claim. The reprimand he received in response to a complaint by United Airlines was, as previously discussed, consistent with TIMCO's legitimate quality control procedures. His removal as a temporary supervisor reflected a legitimate management preference for another inspector on a particular aircraft inspection line; meetings and discussions, at times heated, concerning proper repair and maintenance documentation or time allocation reporting or a leaked memo were neither unusual nor targeted at Daniel for blowing the whistle. I am, of course, mindful that Neville noticed, over time, that "things got a little tougher" for Daniel, and Sizemore testified that management "may have been a little rough" on him at

times; however, even Sizemore acknowledged that he had never seen anyone actually harassing Daniel.

Considering the totality of the circumstances, Daniel has failed to demonstrate that the TIMCO workplace evolved into a hostile environment in response to his protected activity. Neither discussions about proper documentation of work, nor leaked memos, nor the temporary reassignments, alone or in combination, establish altered conditions of employment or satisfy the severe, detrimental effect requirements of a hostile work environment case; and, in the two instances in which discipline was actually imposed, TIMCO provided clear and convincing proof establishing the non-discriminatory application of its rules of conduct and quality control procedures. Consequently, discriminatory retaliation against a protected employee has not been demonstrated on this record.

For all of the reasons set forth in detail above, clear and convincing evidence in the record persuades me that protected activity was not, in this instance, a factor contributing to the adverse personnel actions Daniel experienced. Accordingly,

ORDER

IT IS ORDERED that the complaint filed in this matter be, and it hereby is, dismissed.

A

Stuart A. Levin
Administrative Law Judge